

RECENT DEVELOPMENTS

*Brown v. ABF Freight Systems, Inc.**

I. INTRODUCTION

Throughout the years, in an effort to determine the underlying question of whether a union can, by including a mandatory arbitration clause in a collective bargaining agreement (CBA), effectively waive an employee's right to a judicial forum, the United States Court of Appeals for the Fourth Circuit has engaged the United States Supreme Court in a frustrating game of "twenty questions."¹ After many years of uncertainty in this area, the game still continues with the Supreme Court refusing to answer the ultimate question of whether such a waiver would be enforceable.² Nevertheless, the Supreme Court has provided drafting guidance by explaining straightforwardly that the agreement to arbitrate such claims must be "clear and unmistakable."³

Forced to change its ways, the Fourth Circuit has begun to apply this rigorous standard set forth by the Supreme Court.⁴ Although the high Court has avoided ruling on the ultimate question of enforceability, the Fourth

* 183 F.3d 319 (4th Cir. 1999).

¹ This litany includes the infamous *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (enforcing such waivers in the context of individual employment agreements), which arose out of the Fourth Circuit, *see id.* at 24, 35, *aff'g* 895 F.2d 195 (4th Cir. 1990); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996) (holding that *Gilmer* extends to include mandatory arbitration provisions in CBAs in the context of civil rights violations); and *Wright v. Universal Maritime Service Corp.*, 119 S. Ct. 391 (1998) (holding that if a CBA mandating the arbitration of a statutory claim is to be enforceable, it must be stated in "clear and unmistakable" language), which also originated from the Fourth Circuit, *see id.* at 394, 397, *vacating* 121 F.3d 702 (4th Cir. 1997).

² *See Wright*, 119 S. Ct. at 397 (stating that because the CBA at issue did not contain a valid waiver of the right to a judicial forum, the Court did not have to reach the question of whether such a waiver would be enforceable).

³ *Id.* at 396 (citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)). When a union negotiates a waiver of employees' rights to a federal judicial forum, the usual presumption of arbitration does not apply; rather, the CBA must contain a waiver that is "clear and unmistakable." *Id.* at 396.

⁴ *See Carson v. Giant Food, Inc.*, 175 F.3d 325, 331 (4th Cir. 1999) (explaining for the first time that "[i]n the collective bargaining context, the parties 'must be particularly clear' about their intent to arbitrate statutory discrimination claims" (quoting *Wright*, 119 S. Ct. at 396)).

Circuit has reemphasized in its most recent case, *Brown v. ABF Freight Systems, Inc.*,⁵ that a “clear and unmistakable” union-negotiated waiver of the statutory right to a federal forum will be enforced by the judiciary.⁶ Thus submitting to the newly announced standard while maintaining its stance on enforceability, the Fourth Circuit leaves the Supreme Court with one final question—“now are we right?”

II. THE FACTS AND PROCEDURAL HISTORY OF *BROWN V. ABF FREIGHT SYSTEMS, INC.*

On April 21, 1997, Jerome Brown, a commercial truck driver suffering from diabetes, filed a complaint in the United States District Court for the Eastern District of Virginia after ABF Freight Systems, Inc. (ABF) informed Brown that it would no longer accept his bids for yard and dock jobs.⁷ Brown’s complaint alleged that ABF violated the Americans with Disabilities Act of 1990 (ADA)⁸ and the Virginians with Disabilities Act.⁹ In response to Brown’s complaint, ABF argued that its CBA with Brown’s union, the International Brotherhood of Teamsters, required Brown to submit his ADA claim to binding arbitration pursuant to grievance procedures outlined within the CBA.¹⁰

⁵ 183 F.3d 319 (4th Cir. 1999).

⁶ *Id.* at 322.

⁷ *See id.* at 320.

⁸ 42 U.S.C. §§ 12101 *et seq.* (1994 & Supp. II 1996); *see also Brown*, 183 F.3d at 320.

⁹ VA. CODE ANN. §§ 51.5-40 to .5-52 (Michie 1998 & Supp. 1999); *Brown*, 183 F.3d at 320.

¹⁰ *See Brown*, 183 F.3d at 320. In pertinent part, Article 37 of the CBA set forth the “Nondiscrimination” clause by providing that:

The Employer and the Union agree not to discriminate against any individual with respect to hiring, compensation, terms or conditions of employment because of such individual’s race, color, religion, sex, age, or national origin nor will they limit, segregate or classify employees in any way to deprive any individual employee of employment opportunities because of race, color, religion, sex, age, or national origin or engage in any other discriminatory acts prohibited by law. This Article also covers employees with a qualified disability under the Americans with Disabilities Act.

Id. Additionally, Article 8 of the CBA established that “[a]ll grievances or questions of interpretation arising under this National Master Freight Agreement or Supplemental Agreements thereto shall be processed as set forth below.” *Id.*

Guided by the Fourth Circuit's prior decisions in *Austin v. Owens-Brockway Glass Container, Inc.*¹¹ and *Brown v. Trans World Airlines*,¹² the district court held that the "general agreement" in Article 37 "not to perform any act violative of any [antidiscrimination] law" combined with the provision in Article 1 stating that "all grievances . . . arising under this . . . agreement [to arbitration]" divested the district court of jurisdiction and required submittal of Brown's claims to arbitration.¹³

Thereafter, Brown filed a timely notice of appeal.¹⁴ Consequently, the Fourth Circuit held the case in abeyance pending the Supreme Court's review of the Fourth Circuit's prior decision in *Wright v. Universal Maritime Service Corp.*¹⁵ Moreover, subsequent to Brown's filing of his appellate brief, but prior to oral arguments, the Fourth Circuit applied the newly announced standard articulated in *Wright* to the CBA in the recent Fourth Circuit case of *Carson v. Giant Food, Inc.*¹⁶ It was in the light of the Supreme Court's decision in *Wright* and the Fourth Circuit's subsequent application of that decision in *Carson* that the Fourth Circuit considered Brown's appeal.¹⁷

A. *Wright v. Universal Maritime Service Corp.*

On February 18, 1992, Ceasar Wright was injured while working as a longshoreman and ultimately settled a claim for permanent disability under the Longshore and Harbor Workers' Compensation Act.¹⁸ With the approval of his doctor, several years later, Wright sought employment as a longshoreman through the union.¹⁹ Thereafter, Wright was employed by four stevedoring companies as a longshoreman.²⁰ Although he received no

¹¹ 78 F.3d 875 (4th Cir. 1996) (holding that a CBA requiring arbitration of a union member's statutory discrimination claims is enforceable).

¹² 127 F.3d 337 (4th Cir. 1997) (stating that the question of whether a CBA requires arbitration is a matter of contract law).

¹³ *Brown*, 183 F.3d at 320.

¹⁴ *See id.* at 320-21.

¹⁵ 119 S. Ct. 391 (1998); *see also Brown*, 183 F.3d at 321.

¹⁶ *See* 175 F.3d 325, 331 (4th Cir. 1999) (stating that "[i]nstead, collective bargaining agreements to arbitrate these claims, unlike contracts executed by individuals, must be 'clear and unmistakable'" (quoting *Wright*, 119 S. Ct. at 396)).

¹⁷ *See Brown*, 183 F.3d at 321.

¹⁸ *See Wright*, 119 S. Ct. at 393.

¹⁹ *See id.*

²⁰ *See id.*

complaints about his performance, when the stevedoring companies realized that Wright had settled a claim for permanent disability, they informed the union that Wright was not qualified for employment under the CBA and they would not employ him in the future.²¹ Wright contacted the union which advised him to file a claim under the ADA.²² After doing so, the United States District Court for the District of South Carolina dismissed the claim, without prejudice, for failure to pursue the mandatory arbitration procedures contained within the CBA.²³ On appeal, the Fourth Circuit affirmed, holding that a mandatory arbitration clause in a CBA may effectively waive an employee's right to sue, based on its prior decision in *Austin*.²⁴ The Supreme Court granted certiorari.²⁵

Writing for a unanimous court, Justice Scalia succinctly targeted the issue by stating that "[t]his case presents the question whether a general arbitration clause in a . . . CBA requires an employee to use the arbitration procedure for an alleged violation of the Americans with Disabilities Act of 1990."²⁶ Thus, the Supreme Court's holding was limited to its view that the ADA claim was not within the scope of the arbitration clause; the Court never reached the merits of the Fourth Circuit's decision that a union's valid waiver of an employee's right to sue may be enforced.²⁷

Probably the most prominent and frustrating aspect of the Court's decision in *Wright* is the fact that the Court begins by recognizing the "tension" between two lines of cases in this area of law.²⁸

²¹ See *id.*

²² See *id.* at 394.

²³ See *id.*

²⁴ See *id.*; see also *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 885 (4th Cir. 1996).

²⁵ See *Wright*, 119 S. Ct. at 394.

²⁶ *Id.* at 392-93.

²⁷ See *id.* at 397.

²⁸ *Id.* at 395. Compare *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974) ("Of necessity, the rights conferred [by statute] can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.") with *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) ("Although all statutory claims may not be appropriate for arbitration, '[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985))). In an effort to resolve this tension, the Fourth Circuit declared that *Gardner-Denver*

Whereas *Gardner-Denver* stated that “an employee’s rights under Title VII are not susceptible of prospective waiver,” . . . *Gilmer* held that the right to a federal judicial forum for an [Age Discrimination in Employment Act] claim could be waived. [Wright] . . . and the United States as *amicus* would have us reconcile the lines of authority by maintaining that federal forum rights cannot be waived in union-negotiated CBAs even if they can be waived in individually executed contracts—a distinction that assuredly finds support in the text of *Gilmer* . . . Respondents . . . , on the other hand, contend that the real difference between *Gardner-Denver* and *Gilmer* is the radical change, over two decades, in the Court’s receptivity to arbitration . . . ; *Gilmer*, they argue, has sufficiently undermined *Gardner-Denver* that a union *can* waive employees’ rights to a judicial forum.²⁹

Nonetheless, the Court stubbornly failed to resolve the important question of whether *Gilmer* did, in fact, overrule *Gardner-Denver*.³⁰ Although cryptic about that answer, the *Wright* Court did provide valuable insight

effectively was overruled by the more recent *Gilmer* decision. See *Austin*, 78 F.3d at 880–85. However, a majority of other circuits concluded that the *Gilmer* Court did not overrule *Gardner-Denver*, but explicitly distinguished it. See, e.g., *Albertson’s, Inc. v. United Food & Commercial Workers Union*, 157 F.3d 758, 762 (9th Cir. 1998) (“As *Gilmer* makes clear, that decision does not bear on the right of employees covered by a collective bargaining agreement to litigate their [statutory] claims.”); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1453 (10th Cir. 1997) (stating that “the majority view is that *Alexander* and its progeny ‘remain good law and that statutory employment claims are independent of a collective bargaining agreement’s grievance and arbitration procedures’” (quoting Martin H. Malin, *Arbitrating Employment Claims in the Aftermath of Gilmer*, 40 ST. LOUIS U. L.J. 77, 84 (1996))); *Varner v. National Super Mkts., Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996) (observing that “the United States Supreme Court has held that the pursuit of a claim through grievance and binding arbitration under a CBA does not preclude a civil suit under Title VII” (citing *Gardner-Denver*, 415 U.S. at 49, 94)). Most jurisdictions distinguished the two cases based on the *Gilmer* Court’s acknowledgement that an important concern in *Gardner-Denver* “was the tension between collective representation and individual statutory rights.” *Gilmer*, 500 U.S. at 35; see also *Harrison*, 112 F.3d at 1453–54. Thus, the majority of circuits have held that while *Gilmer* stands for the proposition that an individual may waive his statutory right to a judicial forum, *Gardner-Denver* stands for the proposition that the right to a judicial forum cannot be waived by majoritarian process (vis-à-vis a CBA). See *Gardner-Denver*, 415 U.S. at 51–52; *Harrison*, 112 F.3d at 1453; Malin, *supra*, at 84.

²⁹ *Wright*, 119 S. Ct. at 395 (citations omitted).

³⁰ See *id.* (stating that “we find it unnecessary to resolve the question of the validity of a union-negotiated waiver”).

concerning the drafting of mandatory arbitration provisions in CBAs,³¹ and the Fourth Circuit followed the lead.³²

The *Wright* decision makes it abundantly clear that mandatory arbitration provisions in CBAs will be subject to rigorous judicial inspection and thus must be drafted carefully with precise language.³³ Furthermore, there will be no application of the usual interpretive presumption in favor of arbitration in these types of cases.³⁴ Rather, an intent to arbitrate statutory claims will not be found absent a "clear and unmistakable" waiver of an employee's statutory right to a judicial forum for claims concerning employment discrimination.³⁵ Although the Supreme Court did not decide the issue expressly, the tone of its opinion suggests that the Court may be receptive to the idea of enforcing arbitration of discrimination claims once a clear and unmistakable waiver of the judicial forum has been identified in the CBA.

B. *Carson v. Giant Food, Inc.*

In September 1996, plaintiffs, current and former African-American employees of the Giant Food supermarket chain (Giant), brought suit claiming that Giant and its personnel discriminated against its employees on the basis of race, age, and disability.³⁶ They alleged numerous individual and class claims under Title VII of the Civil Rights Act of 1964,³⁷ 42 U.S.C. § 1981,³⁸ the Age Discrimination in Employment Act (ADEA),³⁹

³¹ See *id.* at 396-97.

³² See *Brown v. ABF Freight Sys., Inc.*, 183 F.3d 319, 322 (4th Cir. 1999) (holding that "the parties must make 'unmistakably clear' their intent to incorporate in their entirety the 'discrimination statutes at issue'" (quoting *Carson v. Giant Food, Inc.*, 175 F.3d 325, 331 (4th Cir. 1999))).

³³ See *Wright*, 119 S. Ct. at 396.

³⁴ See *id.* at 395-96. The Court reasoned that the rationale behind the presumption in favor of arbitration is the belief that arbitrators are in a better position than courts to interpret the terms of a CBA. See *id.* at 395. However, that rationale is inapplicable in the case at hand, because the ultimate concern in *Wright* was with the meaning of a federal statute, not a CBA. See *id.* at 396; *Brown*, 183 F.3d at 321.

³⁵ *Wright*, 119 S. Ct. at 396.

³⁶ See *Carson*, 175 F.3d at 327.

³⁷ 42 U.S.C. §§ 2000e to 2000e-17 (1994 & Supp. II 1996).

³⁸ 42 U.S.C. § 1981 (1994).

³⁹ 29 U.S.C. §§ 621-634 (1994 & Supp. III 1997).

and the ADA.⁴⁰ In response, the defendants acknowledged that the plaintiffs were represented by four different unions and entered into four different CBAs; however, all four CBAs contained similar language requiring the arbitration of employee statutory discrimination claims.⁴¹ Moreover, the defendants based their claim on two specific clauses that appeared in each of the four CBAs—the arbitration clause and the nondiscrimination clause.⁴² Nonetheless, the district court denied Giant's motion for summary judgment and certified the issue for interlocutory appeal.⁴³ The Fourth Circuit affirmed, holding the following: (1) the CBAs' arbitration clauses "do not clearly and unmistakably provide that an arbitrator is to decide which claims the parties agreed to arbitrate"; and (2) the CBAs' nondiscrimination clauses "do not clearly and unmistakably require the arbitration of statutory discrimination claims."⁴⁴

The Fourth Circuit further explained that the "clear and unmistakable" waiver requirement can be satisfied through two means.⁴⁵ First, this waiver can be demonstrated through the drafting of an "explicit arbitration clause."⁴⁶ Under the first means, "the CBA must contain a clear and unmistakable provision under which the employees agree to submit to arbitration all federal causes of action arising out of their employment"—usually within an arbitration clause.⁴⁷ However, the court articulated a

⁴⁰ 42 U.S.C. §§ 12101 *et seq.* (1994 & Supp. II 1996); *see also Carson*, 175 F.3d at 327.

⁴¹ *See Carson*, 175 F.3d at 327.

⁴² *See id.* Three of the CBAs contained the following arbitration clause: "[S]hould any grievance or dispute arise between the parties regarding the terms of this Agreement, [the parties will try to resolve the matter]. . . . If agreement cannot be reached, the parties agree that within five (5) days they shall select a neutral and impartial arbitrator. . . ." *Id.* at 328 (alterations in original). One of the CBAs was slightly different in that it required arbitration of "any controversy, dispute or disagreement . . . concerning the interpretation of the provisions of this Agreement." *Id.* Additionally, the four CBAs contained nondiscrimination provisions similar to the following: "[T]he Employer and the Union in the performance of this Agreement agree not to discriminate against any employee or applicant for employment because of race, sex, age, color, religious creed or national origin." *Id.* at 327–28.

⁴³ *See id.* at 328.

⁴⁴ *Id.* at 327.

⁴⁵ *Id.* at 331.

⁴⁶ *Id.*

⁴⁷ *Id.* at 331–32. Further, such an arbitration clause will bind parties to arbitrate under "a host of federal statutes, including Title VII, 42 U.S.C. § 1981, the ADEA, and the ADA." *Id.* at 332.

second means to meet the valid waiver requirement when the arbitration clause in the CBA is not explicitly clear, such as clauses referring to "all disputes."⁴⁸ The court instructed that when parties use such broad and nonspecific language in the arbitration clause, in order to effectuate a valid waiver, "they must include an 'explicit incorporation of statutory antidiscrimination requirements'" somewhere within the contract—usually within a nondiscrimination clause.⁴⁹

III. THE FOURTH CIRCUIT'S RESOLUTION IN *BROWN*

With the benefit of the Supreme Court's decisions in *Wright* and *Carson*, the Fourth Circuit considered Brown's appeal in an effort to determine whether a union-negotiated waiver of the statutory right to a federal forum was valid and enforceable.⁵⁰ Prior to these decisions, the Fourth Circuit readily admitted that it would have been inclined to conclude that a valid waiver was formed in *Brown*.⁵¹ However, in light of the "clear and unmistakable" waiver requirement, the Fourth Circuit did not find that the intent of the union to waive its employees' statutory right to a judicial forum was established in either the arbitration or the nondiscrimination clause of the CBA.⁵²

In an effort to satisfy the "clear and unmistakable" waiver standard by the first means articulated in *Carson*,⁵³ the court examined the CBA for an explicit arbitration clause.⁵⁴ However, the court found that the arbitration clause contained in Article 37 of the CBA was "insufficiently explicit to pass muster" under *Wright*.⁵⁵ In other words, the court found that the clause requiring arbitration of "all grievances or questions of interpretation arising under . . . this Agreement"⁵⁶ was too broad—the arbitration clause was not explicit enough to constitute a clear and unmistakable waiver of all

⁴⁸ *Id.*; see also *Wright v. Universal Maritime Serv. Corp.*, 119 S. Ct. 391, 396 (1998).

⁴⁹ *Carson*, 175 F.3d at 332 (quoting *Wright*, 119 S. Ct. at 396).

⁵⁰ See *Brown v. ABF Freight Sys., Inc.*, 183 F.3d 319, 321 (4th Cir. 1999).

⁵¹ See *id.*

⁵² *Id.* at 323.

⁵³ See *supra* notes 41–44 and accompanying text.

⁵⁴ See *Brown*, 183 F.3d at 321–22.

⁵⁵ *Id.* at 321.

⁵⁶ *Id.* (alteration in original).

statutory discrimination claims.⁵⁷ The Fourth Circuit further explained that “[b]ecause the arbitration clause refers only to grievances arising under the Agreement, it cannot be read to require arbitration of those grievances arising out of alleged statutory violations.”⁵⁸

Noting that this was not fatal, the Fourth Circuit emphasized that under *Carson’s* second means,⁵⁹ even a “broad but nonspecific” arbitration clause may still “require arbitration of statutory discrimination claims if [the CBA contains a provision] with the ‘requisite degree of clarity’ that the ‘discrimination statute[] at issue is part of the agreement.’”⁶⁰ Nonetheless, the court found that the agreement not to “engage in any other discriminatory acts prohibited by law” as set forth in the nondiscrimination clause of the CBA did not explicitly incorporate the federal statutes; thus, absent such clarity, the disputes must be resolved in the judicial forum.⁶¹

Showing the rigorous scrutiny involved in these types of cases, the court further explained that the language may “parallel, or even parrot, the language of federal antidiscrimination statutes and prohibit some of the same conduct,” but the waiver is not “clear and unmistakable” unless it explicitly incorporates the federal statutes.⁶² Furthermore, the court continued, “[t]here is a significant difference, and we believe a legally dispositive one, between an agreement not to commit discriminatory acts that are prohibited by law and an agreement to incorporate, in toto, the antidiscrimination statutes that prohibit those acts.”⁶³ Furthermore, although the Supreme Court is still silent as to enforceability, once a “clear

⁵⁷ See *id.* at 321–22.

⁵⁸ *Id.*

⁵⁹ See *supra* notes 48–49 and accompanying text.

⁶⁰ *Brown*, 183 F.3d at 322 (quoting *Carson v. Giant Food, Inc.*, 175 F.3d 325, 331 (4th Cir. 1999)).

⁶¹ *Id.* Further, as a general matter of statutory interpretation, the court noted that the explicit reference to the ADA at the end of the Article confirmed its finding—that the Article “covers employees with a qualified disability under the Americans with Disabilities Act.” *Id.* at 321 n.*. The Fourth Circuit reasoned that if all federal antidiscrimination statutes were already incorporated into the CBA, the sentence specifying that individuals with a qualified disability under the ADA would be “entirely superfluous.” *Id.*

⁶² *Id.* at 322.

⁶³ *Id.* (quoting *Wright v. Universal Maritime Serv. Corp.*, 119 S. Ct. 391, 396 (1998)).

and unmistakable waiver" has been found, the Fourth Circuit re-emphasized that the waiver will be enforced.⁶⁴

IV. ANALYSIS: THE ENFORCEABILITY OF THE CLEAR AND UNMISTAKABLE WAIVER

It is now well settled that in order for arbitration to provide a surrogate for the judicial forum in the context of employment disputes, a CBA must contain a "clear and unmistakable" waiver.⁶⁵ However, this does not conclude the game. Even if the employee is aware that he is bound by an arbitration agreement, the employee may not comprehend fully what consent to such an agreement actually means.⁶⁶ This is still a crucial issue considering the fact the process mandated by such arbitration agreements has been criticized as being unfair to employees.⁶⁷ It may be because of this realization that the Supreme Court has left open the question as to the enforceability of such agreements.

Nonetheless, the Fourth Circuit maintains its stance with respect to the enforceability of union-negotiated waivers by answering in the affirmative that they are enforceable provided the waiver meets the requirements set forth by the Supreme Court.⁶⁸ In *Austin*, the Fourth Circuit first articulated its view that an agreement to arbitrate ADA and Title VII statutory claims was enforceable.⁶⁹ The panel based its decision on the Supreme Court's

⁶⁴ *Id.* at 321. This was not a novel decision by the court. The Fourth Circuit has declared the enforceability of such waivers both before and since *Wright*. See *Carson*, 175 F.3d at 332 (stating that had there been a valid waiver, the judiciary would have given it full effect); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 885 (4th Cir. 1996) (same).

⁶⁵ *Wright*, 119 S. Ct. at 396 (setting forth the "clear and unmistakable" waiver doctrine); *Brown*, 183 F.3d at 321; *Carson*, 175 F.3d at 325.

⁶⁶ See Mei L. Bickner et al., *Developments in Employment Arbitration*, DISP. RESOL. J., Jan. 1997, at 8, 11.

⁶⁷ See *id.* The following primary criticisms raised by employees are that mandatory arbitration agreements: (1) require employees to relinquish their statutory right to a judicial forum controlled by due process; (2) insulate decisions from judicial review; (3) do not guarantee impartiality on behalf of the arbitrator; and (4) are likely to allow the employer to choose the arbitrator. See *id.* For a more in-depth account of the employee's perspective, see generally Joseph D. Garrison, *The Employee's Perspective: Mandatory Binding Arbitration Constitutes Little More Than a Waiver of a Worker's Rights*, DISP. RESOL. J., Fall 1997, at 15.

⁶⁸ See *Brown*, 183 F.3d at 321.

⁶⁹ See *Austin*, 78 F.3d at 880-86.

language in *Gilmer*, making it apparent that agreements to arbitrate statutory claims are enforceable.⁷⁰ The *Gilmer* Court “recognized that ‘[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.’”⁷¹

The Fourth Circuit further noted that it makes no difference whether a dispute arises under an employment contract or a CBA.⁷² Reasoning that the union has a right and a duty to bargain for the terms and conditions of employment, the Fourth Circuit made it clear that there is absolutely no reason to distinguish between a CBA that bargains away the employee’s right to strike and a CBA that bargains for arbitration.⁷³ Thus, the panel

⁷⁰ See *id.* at 882 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27–28 (1991)).

⁷¹ *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). Thus, the Fourth Circuit reasoned, the primary concern in *Gardner-Denver* that arbitration is an “inappropriate forum” for the resolution of statutory rights brought under Title VII was expressly rejected. See *Austin*, 78 F.3d at 880 (interpreting *Gilmer*, 500 U.S. at 26, to mean that arbitration is a suitable forum for resolution of disputes based on statutory rights). Further, in support of this proposition, the *Gilmer* Court stated that criticisms on the adequacy of arbitration “‘res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,’ and as such, they are ‘far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.’” *Gilmer*, 500 U.S. at 30 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)).

⁷² See *Austin*, 78 F.3d at 885 (stating that “[s]o long as the agreement is voluntary, it is valid, and we are of opinion [sic] it should be enforced”). However, it should be understood that the union, by bargaining for arbitration, waives a whole slew of the employees’ rights, as follows:

[T]heir rights under Article I and Article III of the Constitution; (2) their rights under the 5th, 7th, and 14th Amendments; (3) their rights to demand that statutory employment discrimination claims be adjudicated in a federal district court under the Federal Rules of Civil Procedure and the Federal Rules of Evidence by a judge, appointed under Article III of the Constitution, who will provide instruction as to the applicable law to a jury chosen in a fair, objective, and non-discriminatory manner; and (4) their right to appeal an adverse verdict to a U.S. Court of Appeals or to petition for *certiorari* to the U.S. Supreme Court.

Andrea Fitz, *The Debate Over Mandatory Arbitration in Employment Disputes*, DISP. RESOL. J., Feb. 1999, at 35, 74–75. Some commentators argue that it is highly unlikely that any employee would ever waive all of these rights knowingly. See *id.* at 75.

⁷³ See *Austin*, 78 F.3d at 885 (“There is no reason to distinguish between a union bargaining away the right to strike and a union bargaining for the right to arbitrate.”).

reasoned, because the right to arbitrate is a term or condition of employment, a union may bargain for this right on behalf of the employees.⁷⁴

V. CONCLUSION: INCREASING THE ODDS OF ENFORCEABILITY

While *Brown* is not the anticipated final answer on the issue of enforceability from the high Court, it at least clarifies the steps a drafter can take to improve the odds that a court will enforce an arbitration clause formed in a CBA.⁷⁵ The Fourth Circuit directly explains that the CBA should state expressly that the arbitration clause covers not only disputes that may arise under the contract but also those disputes arising under all applicable federal, state, and local employment discrimination statutes, mentioning each statute by name.⁷⁶

Additionally, the Fourth Circuit instructs that it would be wise for the employer to agree explicitly to comply with the employment discrimination statutes, again being careful to mention each statute by name.⁷⁷ This double-fisted approach, while in no way guaranteeing judicial approval, may increase the chances of enforceability during these uncertain times. Unless you are in the Fourth Circuit, or until the Supreme Court provides more guidance on the subject, it is unknown what, if anything, will distinguish an enforceable, clear and unmistakable, union-negotiated arbitration clause from an unenforceable one.

Laurie A. Arsenault

⁷⁴ See *id.*; see also *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957) ("Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike.").

⁷⁵ See generally *Brown v. ABF Freight Sys., Inc.*, 183 F.3d 319 (4th Cir. 1999). Perhaps the question of enforceability will be answered by someone other than the Supreme Court. See, e.g., S. 121, 106th Cong. (1999) (amending certain federal civil rights statutes to prevent the involuntary application of arbitration to claims that arise from unlawful employment discrimination based on race, color, religion, sex, age, or disability); H.R. 872, 106th Cong. (1999) (same); H.R. 613, 106th Cong. (1999) (giving employees the right to accept or reject the use of arbitration to resolve an employment controversy).

⁷⁶ See *Brown*, 183 F.3d at 321.

⁷⁷ See *id.* at 321-22.